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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

SHERI L., Appellant, v. ALEX T., Appellee.	2 CA-JV 2010-0130 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. SV201000003

Honorable Stephen M. Desens, Judge

REVERSED AND REMANDED

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B R A M M E R, Presiding Judge.

¶1 After a contested severance hearing, the juvenile court denied appellant Sheri L.'s petition to terminate the parental rights of her former husband, Alex T., to their two children, Madison and Marcus, born in 2000 and 2003. The petition asserted abandonment as the sole ground for termination. *See* A.R.S. §§ 8-533(B)(1), 8-531(1). Sheri appeals from the court's order denying the petition, asserting the court erroneously applied the law relevant to abandonment. She also contends the court abused its discretion by denying her petition to sever, failing to make additional findings on the record showing Alex had "statutorily abandoned" the children, and failing to grant her motion for a new trial. Sheri asks us either to grant her petition to terminate Alex's parental rights or to reverse the court's denial of her motion for a new trial.[1] For the reasons set forth below, we vacate the court's order denying the petition to terminate Alex's parental rights and remand the case for reconsideration under the correct legal standard.

¶2 To prevail on her petition to terminate Alex's parental rights, Sheri was required to prove abandonment by clear and convincing evidence and to establish by a preponderance of the evidence that termination was in the children's best interests. *See Kent K. v. Bobby M.*, 210 Ariz. 279, ¶¶ 1, 41, 110 P.3d 1013, 1014, 1022 (2005). We

[1]The order appealed from, which Sheri attached to her notice of appeal, did not include the juvenile court's denial of her motion for a new trial and motion for additional findings. Accordingly, we do not address the arguments on appeal related to that ruling. Moreover, in light of our ruling herein, Sheri's challenge to the court's ruling on that motion has been rendered moot.

view the facts in the light most favorable to sustaining a juvenile court's denial of a motion to terminate parental rights, and we will not disturb that ruling unless the court has abused its discretion. *Kenneth B. v. Tina B.*, 226 Ariz. 33, ¶ 12, 243 P.3d 636, 639 (App. 2010). But an abuse of discretion includes an error of law, *see In re Nickolas T.*, 223 Ariz. 403, ¶ 4, 224 P.3d 219, 220 (App. 2010), and "we review de novo any issues of law, including the interpretation of a statute." *Kenneth B.*, 226 Ariz. 33, ¶ 12, 243 P.3d at 639.

¶3 One of the statutory grounds warranting termination of parental rights is a finding "[t]hat the parent has abandoned the child." § 8-533(B)(1). Section 8-531(1) defines abandonment as:

> "Abandonment" means the failure of a parent to provide reasonable support and to maintain regular contact with the child, including providing normal supervision. Abandonment includes a judicial finding that a parent has made only minimal efforts to support and communicate with the child. Failure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes prima facie evidence of abandonment.

¶4 In her petition to terminate Alex's parental rights, filed in February 2010, Sheri alleged Alex had not seen the children or had telephone contact with Marcus since 2008, and that he had "abandoned the children, by failing to provide reasonable support and maintain regular contact with [them], without just cause. . . . He does not send cards or gifts." Alex does not dispute on appeal, nor did he meaningfully do so below, that he had not seen the children regularly since he and Sheri were divorced in 2004, or that he

had accrued significant child support arrearages by the end of 2006. In an apparent attempt to spend more time with the children, Alex filed a petition to modify child custody, parenting time and child support in 2009. Sheri remarried in 2009.

¶5 In its judgment and order denying Sheri's petition to terminate Alex's parental rights, the juvenile court found Alex was current in his child support payments, and thus concluded he had exhibited an "intent" to comply with court orders and to regularly support the children. The court further stated that, although Alex "could have and should have been more consistent and persistent in having a meaningful relationship with his children between 2004 and 2010," the evidence nonetheless showed he had "made more than just minimal efforts to support his children," including compliance with a 2009 increase in child support payments. The court also noted it "had the unique opportunity to observe the parties and the witnesses while they testified" and recognized that Alex had "perceived that he was being thwarted in his parenting time attempts by [Sheri's] failure to communicate, her demands as to how and where parenting time would take place, and a fear that if a disagreement would arise during his parenting time . . . he would be arrested or law enforcement called."

¶6 In paragraph twelve of its judgment and order, the juvenile court quoted the current definition of "abandonment," as set forth in § 8-531(1). However, in following paragraphs of its ruling, the court stated:

> 13. "Abandonment" as a ground for termination of parental rights exists where there is clear and convincing evidence of intentional conduct by a parent, when considered

> objectively, which implies a conscious disregard of normal parental obligations owed by the parent to the child which leads to the destruction of the parent-child relationship.
>
> 14. Questions of abandonment and intent in termination proceedings are questions of fact to be decided by the trial court.
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> . . . .
>
> 23. [Sheri] has failed to meet her burden of proof by clear and convincing evidence that [Alex] intentionally decided to forego his parental duties and obligations to the minor children or consciously disregarded his parental obligations under all the facts and circumstances known to the court.

Declining to find the statutory ground for abandonment had been met, the court concluded Sheri had failed to prove that Alex "intentionally" had abandoned Madison and Marcus, and it was in the children's best interests to have a "meaningful and permanent relationship" with both Alex and Sheri's husband.

¶7 On appeal, Sheri contends the juvenile court erred in its application of the law when it failed to find abandonment had been proven as a ground for termination. Absent evidence to the contrary, we presume the juvenile court knew and correctly applied the law. *See State v. Trostle*, 191 Ariz. 4, 22, 951 P.2d 869, 887 (1997). Here, although some of the statements of law in the court's ruling are correct, the court appears to have construed those statements in the context of applying the "conscious disregard" test, as well as having considered whether Alex intentionally relinquished his parental responsibilities. *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, n.2, 995 P.2d

682, 685 n.2 (2000). Those legal standards were employed before the legislature revised the definition of abandonment in 1994, removing a parent's subjective intent from the statutory definition of abandonment. *See* § 8-531(1).[2] In *Michael J.*, our supreme court expressly rejected the common law "settled purpose doctrine" and "conscious disregard test," which relied in great part on a parent's subjective intent, relying instead on a statutory definition of abandonment. *Michael J.*, 196 Ariz. 246, ¶¶ 15-18, 995 P.2d at 685-86; *see also Kenneth B.*, 226 Ariz. 33, ¶¶ 15-16, 243 P.3d at 639 (recognizing change in law). Thus, the proper inquiry under the current law is "whether a parent has provided reasonable support, maintained regular contact, made more than minimal efforts to support and communicate with the child, and maintained a normal parental relationship," not whether the parent intentionally has relinquished a child. *Michael J.*, 196 Ariz. 246, ¶ 18, 995 P.2d at 685-86; *see also* § 8-531(1).

¶8 Asserting the juvenile court correctly applied the law as set forth in § 8-531(1), Alex argues the court did not rely on the wrong legal standard, rather, "it was in the court's speaking to the evidence required that the language [Sheri] cites was used." He contends the court "was clearly addressing the child support payment history—as black and white objective evidence—and determining intent from that." We recognize that a determination of "reasonable support, regular contact, and normal supervision varies from case to case," *In re Pima County Severance Action No. S-114487*, 179 Ariz. 86, 96, 876 P.2d 1121, 1131 (1994), and involves questions of fact appropriately resolved

[2]1994 Ariz. Sess. Laws, ch. 116, § 4.

by the juvenile court. *Michael J.*, 196 Ariz. 246, ¶ 20, 995 P.2d at 686. However, because the court here stated the incorrect legal standard as a general principle of law and concluded Sheri had failed to show that Alex had "intentionally decided to forego his parental duties and obligations" to the children, or that he had "consciously disregarded his parental obligations," we conclude the court did not apply the proper legal standard. For this reason, we remand for reconsideration of the facts under the correct standard. Nor will we presume to reweigh the evidence under the correct legal standard. *Cf. Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 5, 210 P.3d 1263, 1265 (App. 2009) (we do not reweigh evidence on appeal).

¶9 Because the juvenile court's failure to apply the correct legal standard to determine whether Alex had abandoned the children may have affected its finding that termination was not in the children's best interests, we also vacate the court's best interests finding. On remand, the court will reconsider whether severing Alex's parental rights is in the children's best interests under the proper legal standard for abandonment. We thus do not address Sheri's claim that the best interests finding was erroneous.

¶10 Sheri has requested an award of attorney fees and costs on appeal pursuant to A.R.S. §§ 12-341 and 12-341.01. She presumably is suggesting Alex's defense on appeal "constitutes harassment, is groundless and is not made in good faith." § 12-341.01(C). However, Sheri has not provided sufficient evidence or argument to support any such claim, nor would we so characterize Alex's arguments on appeal. Additionally, we note that Rule 21, Ariz. R. Civ. App. P. (costs and attorneys' fees), is not among the

Arizona Rules of Civil Appellate Procedure that Rule 103(G), Ariz. R. P. Juv. Ct., makes applicable to appeals in juvenile cases. In our discretion, therefore, we deny Sheri's request for attorney fees and costs on appeal.

¶11 For the reasons set forth above, we vacate the juvenile court's September 30 order denying the petition to terminate Alex's parental rights and remand for further proceedings consistent with this decision, and deny Sheri's request for attorney fees and costs.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge